

JUL 28 1995

CLERK

No. 94-8769

In The  
**Supreme Court of the United States**  
October Term, 1995

---

TOMMY L. RUTLEDGE,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

---

**On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Seventh Circuit**

---

**JOINT APPENDIX**

---

JEROLD S. SOLOVY  
JENNER & BLOCK  
One IBM Plaza  
Chicago, Illinois 60611  
(312) 222-9350  
*Counsel for Petitioner*

DREW S. DAYS, III  
Solicitor General  
Department of Justice  
Washington, D.C. 20530  
(202) 514-2217  
*Counsel for Respondent*

---

**Petition For Certiorari Filed April 3, 1995  
Certiorari Granted June 26, 1995**

---

## TABLE OF CONTENTS

	Page
Chronological List of Relevant Docket Entries.....	1
Second Superseding Indictment (12/4/91).....	2
Judgment of U.S. District Court (12/29/92) .....	8
Opinion of Seventh Circuit (11/10/94).....	25
Order of Seventh Circuit on Petition for Rehearing (1/3/95) .....	48
Order of U.S. Supreme Court (6/26/95).....	49

**CHRONOLOGICAL LIST OF  
RELEVANT DOCKET ENTRIES**

---

<b>DATE</b>	<b>FILINGS - PROCEEDINGS</b>
12/04/91	Second Superseding Indictment filed against Tommy L. Rutledge
06/25/92	Jury Verdicts delivered and filed
12/29/92	Judgment filed by the United States District Court for the Central District of Illinois
11/10/94	Opinion and Judgment filed by the United States Court of Appeals for the Seventh Circuit
01/03/95	Rehearing and Rehearing En Banc denied by the United States Court of Appeals for the Seventh Circuit

---



IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF ILLINOIS  
AT ROCK ISLAND

UNITED STATES OF AMERICA,	)
Plaintiff,	) Criminal No.
	) 91-40009
v.	)
TOMMY LEE RUTLEDGE,	) VIO: Title 18, United
SHELLY HENSON,	) States Code, Sections
RICHARD HAGEMASTER,	) 2, 922(g) and 924(c);
STAN WINTERS, and	) Title 21, United
DONALD TAYLOR,	) States Code,
Defendants.	) Sections 841(a)(1),
	) 846 and 848

SECOND SUPERSEDING INDICTMENT

The Grand Jury charges:

COUNT 1

Beginning in or about early 1988 and continuing at least until in or about late 1990, in Warren County, Illinois, within the Central District of Illinois, and elsewhere,

TOMMY LEE RUTLEDGE,

the defendant herein, knowingly and intentionally did engage in a continuing criminal enterprise, namely a series of violations of Title 21, United States Code, Sections 841(a)(1) and 846 by repeatedly distributing and possessing with intent to distribute quantities of cocaine, which continuing series of violations were undertaken by

TOMMY LEE RUTLEDGE

in concert with at least five (5) other persons with respect to whom

TOMMY LEE RUTLEDGE

occupied positions of organizer, supervisor, and other positions of management, and from which continuing series of violations

TOMMY LEE RUTLEDGE

obtained substantial income and resources.

2. As part of this continuing criminal enterprise, the defendant,

TOMMY LEE RUTLEDGE,

committed and caused to be committed numerous acts, including but not limited to the acts set forth hereinafter in Counts 3, 4 and 5, which counts are incorporated by reference as if fully set forth here.

In violation of Title 21, United States Code, Section 848.

COUNT 2

1. Beginning in or about early 1988, and continuing until in or about late 1990, in Warren County, within the Central District of Illinois and elsewhere,

TOMMY LEE RUTLEDGE,  
SHELLY HENSON,  
RICHARD HAGEMASTER,  
STAN WINTERS, and  
DONALD TAYLOR,

the defendants herein, did knowingly combine, conspire and agree with each other and both with persons known and with persons unknown to the grand jury to commit certain acts in violation of the laws of the United States, to-wit: (a) to knowingly possess with intent to distribute cocaine, a Schedule II controlled substance; and (b) to knowingly distribute cocaine, a Schedule II controlled substance, both in violation of Title 21, United States Code, Section 841(a)(1).

2. Over the course of the conspiracy that the defendants distributed and caused to be distributed in excess of 5 kilograms of cocaine.

#### OVERT ACTS

3. In furtherance of the conspiracy and to accomplish its objects of possessing with intent to distribute and distributing cocaine, the defendants and other persons both known and unknown to the grand jury did commit overt acts, including but not limited to the following:

1. In late 1988, Richard Hagemaster delivered cocaine to an individual for Tommy Lee Rutledge;

2. In early 1989, Tommy Lee Rutledge and Donald Taylor travelled to Iowa to purchase cocaine;

3. In January, 1989, Tommy Lee Rutledge and Shelly Henson distributed cocaine to an individual;

4. In mid-1990, Stan Winters delivered cocaine to an individual for Tommy Lee Rutledge.

All in violation of Title 21, United States Code, Section 846.

#### COUNT 3

In or about January, 1989, in Warren County, within the Central District of Illinois,

TOMMY L. RUTLEDGE, and  
SHELLY HENSON,

the defendants herein, did knowingly distribute cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

#### COUNT 4

On or about July 14, 1989, in Warren County, within the Central District of Illinois,

TOMMY L. RUTLEDGE,

the defendant herein, did knowingly possess a firearm which had previously travelled in interstate or foreign commerce, to-wit: numerous shotguns, rifles and pistols, the defendant having been previously convicted under the laws of the State of Illinois of a crime punishable by imprisonment for a term exceeding one year.

In violation of Title 18, United States Code, Section 922(g).

COUNT 5

In or about July, 1989, in Warren County, within the Central District of Illinois,

TOMMY LEE RUTLEDGE,

the defendant herein, did knowingly use and carry a firearm during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States, that is the distribution of cocaine, in violation of Title 21, United States Code, Section 841.

In violation of Title 18, United States Code, Section 924(c).

COUNT 6

On or about July 14, 1989, in Warren County, within the Central District of Illinois,

TOMMY LEE RUTLEDGE,

the defendant herein, did knowingly use and carry a firearm during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States, that is, the distribution of controlled substances and the possession of controlled substances with intent to distribute, in violation of Title 21, United States Code, Section 841.

In violation of Title 18, United States Code, Section 924(c).

A True Bill,

/s/ Illegible  
Foreperson

/s/ J. William Roberts by Byron Illegible  
J. WILLIAM ROBERTS  
UNITED STATES ATTORNEY

---



United States District Court  
CENTRAL District of ILLINOIS

UNITED STATES  
OF AMERICA

v.

TOMMY L. RUTLEDGE

**JUDGMENT IN A  
CRIMINAL CASE**  
(For Offenses Committed  
On or After  
November 1, 1987)

Case Number: 91-40009-01  
(Filed Dec. 29, 1992)

(Name of Defendant) Howard Vincent Thomas  
Defendant's Attorney

THE DEFENDANT: Tommy L. Rutledge

\_\_\_ pleaded guilty to count(s) \_\_\_\_\_.

XX was found guilty on count(s) 1-6 of the second  
superseding indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such  
count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:848	Continuing Criminal Enterprise	12/1/90	1
21:846	Conspiracy to possess with intent to distribute & to distribute concaine, a schedule II controlled substance	12/1/90	2
21:841(a)(1) & 18:2	Distribution of cocaine, a schedule II controlled substance	12/1/90	3

18:922(g)	Felon in possession of a firearm	12/1/90	4
18:9249(c)	Armed drug trafficker	12/1/90	5 & 6

The defendant is sentenced as provided in pages 2  
through 12 of this judgment. The sentence is imposed  
pursuant to the Sentencing Reform Act of 1984.

\_\_\_ The defendant has been found not guilty on count(s)  
\_\_\_\_\_ and is discharged as to such  
count(s).

XX Count(s) original cts. 1.-3 & 1st superseding counts  
1-3) (is)(are) dismissed on the motion of the United  
States.

XX It is ordered that the defendant shall pay a special  
assessment of \$300.00, for count(s) 1-6 of second  
superseding indictment which shall be due X imme-  
diately \_ as follows:

IT IS FURTHER ORDERED that the defendant shall  
notify the United States attorney for this district within  
30 days of any change of name, residence, or mailing  
address until all fines, restitution, costs, and special  
assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 361-38-1590	December 23, 1992
Defendant's Date of Birth: 06-11-47	Date of Imposition of Sentence
Defendant's Mailing Address:	/s/ Michael M. Mihm
in custody	Signature of Judicial Officer
	MICHAEL M. MIHM-CHIEF, U.S. DISTRICT JUDGE
Defendant's Residence Address:	Name & Title of Judicial Officer
in custody	December 29, 1992
	Date

### IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of life on Count 1 of 2nd Superseding Indictment: life without possible release to run concurrent to Count 1 on Count 2 of the 2nd superseding indictment; life without possible release to run concurrent to Counts 1 & 2 on Count 3 of the 2nd superseding indictment; ten (10) years on Count 4 of the 2nd superseding indictment [sic] to run concurrent with counts 1, 2 & 3; sixty (60) months on Count 5 of the 2nd superseding indictment to run consecutive to counts 1, 2, 3, 4 & 6; one hundred twenty (120) months on Count 6 of the 2nd superseding indictment to run consecutive to Counts 1, 2, 3, 4 & 5.

- The court makes the following recommendations to the Bureau of Prisons:
- XX The defendant is remanded to the custody of the United States marshal.

- The defendant shall surrender to the United States marshal for this district.
- at \_\_\_\_\_ a.m. p.m. on \_\_\_\_\_ as notified by the United States marshal.
- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
- before 2 p.m. on \_\_\_\_\_ as notified by the United States marshal.
- as notified by the probation office.

### RETURN

I have executed this judgment as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_ at \_\_\_\_\_, with a certified copy of this judgment.

By \_\_\_\_\_ United States Marshal  
Deputy Marshal

### FINE

The defendant shall pay a fine of \$ \_\_\_\_\_. The fine includes any costs of incarceration and/or supervision.



— This amount is the total of the fines imposed on individual counts, as follows:

NO FINE, COSTS OF INCARCERATION OR RESTITUTION ARE APPROPRIATE.

— The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

- The interest requirement is waived.
- The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

- in full immediately.
- in full not later than \_\_\_\_\_.
- in equal monthly installments over a period of \_\_\_\_\_ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
- in installments according to the following schedule of payments:

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

#### STATEMENT OF REASONS

- ( ) The Court adopts the factual findings and guideline application in the Presentence Report.

OR

- (X) The Court adopts the factual findings and guidelines application in the Presentence Report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 40

Criminal History Category: VI

Imprisonment Range: Counts 1-4: to life months  
Count 5: 5 years & Count 6: 10 years

Count 1: 20 years  
 Counts 2 & 3: life  
 Count 5: 5 years

Mandatory Min: Count 6: 10 years

Supervised Release Range: 3 to 5 years

Count 1: 3-5 years; Counts 2 & 3: N/A; Counts 4, 5 & 6: 2-3 years

Fine: \$25,000 to \$8,000,000.00

(XX) Fine is waived or is below the guideline range because of the defendant's inability to pay.

Restitution: \$N/A

( ) Full restitution is not ordered for the following reason(s):

( ) The sentence is within the guideline range, that range does not exceed 24 months, and the Court finds no reason to depart from the sentence called for by application of the guidelines.

OR

(XX) The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons: pursuant to the statutory enhancements of life imprisonment

OR

The sentence departs from the guideline range

( ) upon motion of the Government, as a result  
of defendant's substantial assistance.

( ) for the following reasons:

\* \* \*

RE: RUTLEDGE, Tommy Lee

**ADDENDUM II TO THE PRESENTENCE REPORT  
DATED 09/23/92 AND REVISED 10/29/92**

NAME: RUTLEDGE, Tommy Lee

DOCKET NO. 91-40009-01

The following objections were raised by the Government  
and defendant and ruled on by the Court at the Decem-  
ber 23, 1992, Sentencing Hearing.

OBJECTIONSBy the GovernmentI. Reference page 26, paragraph 146

A. The Government objects to paragraph 146 as  
a consecutive term of imprisonment of 60  
months must be imposed on Count 5, and a  
consecutive term of imprisonment of 120  
months must be imposed on Count 6.

B. The defendant neither objects nor concurs  
with the Government.

Court's Findings.

1.    Court adopts probation officer's position.
2.   X   Court adopts Government's position.
3.    Court adopts defendant's position.
4.    Other: \_\_\_\_\_

By the DefendantI. Reference page 19, paragraph 105

- A. The defendant objects to paragraph 105 as the conviction in this paragraph was reversed and overturned by the State of Illinois Appellate Court. Therefore, the three criminal history points documented in this paragraph should be deleted.
- B. The position of the Government and probation office concurs with that of the defendant.

Court's Findings

1. ☐ Court adopts probation officer's position.
2. ☐ Court adopts Government's position.
3. ☒ Court adopts defendant's position.
4. ☐ Other: \_\_\_\_\_

II. Reference page 19, paragraph 109

- A. The defendant objects to paragraph 109 as the conviction contained in this paragraph was reversed and overturned by the State of Illinois Appellate Court. Therefore, the two criminal history points contained in this paragraph should be deleted.
- B. The position of the Government and probation office concurs with that of the defendant.

Court's Findings

1. ☐ Court adopts probation officer's position.
2. ☐ Court adopts Government's position.
3. ☒ Court adopts defendant's position.
4. ☐ Other: \_\_\_\_\_

III. Reference page 21, paragraph 113

- A. The defendant objects to paragraph 113 as the conviction contained in this paragraph was in regards to his son, Thomas L. Rutledge Jr., and not the defendant. Therefore, the one criminal history point contained in this paragraph should be deleted.
- B. The position of the Government and the probation office concurs with that of the defendant.

Court's Findings

1. ☐ Court adopts probation officer's position.
2. ☐ Court adopts Government's position.
3. ☒ Court adopts defendant's position.
4. ☐ Other: \_\_\_\_\_



IV. Reference page 21, paragraphs 114 and 115

- A. The Defendant objects to the additional criminal history points contained in these paragraphs.
- B. The position of the Government and probation office remains as stated in paragraphs 114 and 115.

Court's Findings

- 1. ☒ Court adopts probation officer's position.
- 2. ☒ Court adopts Government's position.
- 3. ☐ Court adopts defendant's position.
- 4. ☐ Other: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

V. Reference page 23, paragraph 131

- A. The defendant objects to paragraph 131 as the arrest contained in this paragraph involved the defendant's son, Thomas L. Rutledge Jr., and not the defendant.
- B. The position of the Government and probation office concurs with that of the defendant.

Court's Findings

- 1. ☐ Court adopts probation officer's position.
- 2. ☐ Court adopts Government's position.
- 3. ☒ Court adopts defendant's position.

- 4. ☐ Other: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

VI. Reference pages 13, 14, and 17, paragraphs 85, 86, 87, and 98

- A. The defendant objects to these paragraphs as he never made death threats against any witnesses, codefendants, or U.S. Attorneys.
- B. The position of the Government and probation office remains as stated in paragraphs 85, 86, 87, and 98.

Court's Findings

- 1. ☐ Court adopts probation officer's position.
- 2. ☐ Court adopts Government's position.
- 3. ☐ Court adopts defendant's position.
- 4. ☒ Other: The Court found the defendant did threaten witnesses and codefendants. However, the Court was unable to determine if the letter (poem entitled "Satan Letter") prepared by the defendant was intended to be threatening.

VII. Reference Offense Conduct

- A. The defendant objects to all statements by all the codefendants concerning the quantities of cocaine, arson, and trade of weapons as all of these statements are untrue and based upon mere heresay [sic].
- B. The position of the Govenrment [sic] and probation office remains as stated in the

Offense Conduct section of the Presentence Report.

Court's Findings

1. ☒ Court adopts probation officer's position.
2. ☒ Court adopts Government's position.
3. ☐ Court adopts defendant's position.
4. ☐ Other: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

VIII. Reference page 3, paragraph 14

- A. The defendant objects to paragraph 14 as Richard Hagemaster never delivered cocaine for the defendant, Tom Rutledge and Don Taylor never traveled to Iowa to purchase cocaine, Tom Rutledge and Shelly Henson never distributed cocaine, and Stan Winters never delivered cocaine for Tom Rutledge.
- B. The position of the Government and probation office remains as stated in paragraph 14.

Court's Findings

1. ☒ Court adopts probation officer's position.
2. ☒ Court adopts Government's position.
3. ☐ Court adopts defendant's position.
4. ☐ Other: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

IX. Reference page 3, paragraph 16

- A. The defendant objects to paragraph 16 as he did not possess numerous firearms at any time.
- B. The position of the Government and probation office remains as stated in paragraph 16.

Court's Findings

1. ☒ Court adopts probation officer's position.
2. ☒ Court adopts Government's position.
3. ☐ Court adopts defendant's position.
4. ☐ Other: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

X. Reference page 3, paragraph 17

- A. The defendant did not carry a firearm or carry a firearm during and in relation to any drug trafficking crime. Further, the U.S. Government dismissed the charges against Tom Rutledge for possessing firearms on or about July 14, 1989.
- B. The position of the Government and probation office remains as stated in paragraph 17.

Court's Findings

1. ☒ Court adopts probation officer's position.
2. ☒ Court adopts Government's position.
3. ☐ Court adopts defendant's position.

4. Other: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

XI. Reference page 5, paragraphs 29, 30, and 31

- A. The defendant objects to these paragraphs as Rick Bolen did not testify during the trial and cannot be considered a credible witness.
- B. The position of the Government and probation office remains as stated in paragraphs 29, 30, and 31.

Court's Findings

1. ☒ Court adopts probation officer's position.
2. ☒ Court adopts Government's position.
3. ☐ Court adopts defendant's position.
4. ☐ Other: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

XII. Reference Offense Conduct

- A. The defendant objects to the offense conduct as he did not possess, sell, or distribute or conspire to do any drug transactions.
- B. The position of the Government and probation office remains as stated in the Offense Conduct section of the Presentence Report.

Court's Findings

1. ☒ Court adopts probation officer's position.
2. ☒ Court adopts Government's position.
3. ☐ Court adopts defendant's position.
4. ☐ Other: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

XIII. Reference page 5, paragraph 33

- A. The defendant objects to paragraph 33 as he did not visit Mustread in Galesburg, Illinois, and he did not purchase 4 ounces of cocaine.
- B. The position of the Government and probation office remains as stated in paragraph 33.

Court's Findings

1. ☐ Court adopts probation officer's position.
2. ☐ Court adopts Government's position.
3. ☐ Court adopts defendant's position.
4. ☒ Other: The Court found that defendant Rutledge did not visit Mustread in Galesburg, Illinois. However, the Court did find that the defendant purchased 4 ounces of cocaine while with Mustread.

XIV. Reference page 6, paragraph 35

- A. The defendant objects to paragraph 35 as John Wilson was called as a defense witness at trial and testified that he did not trade defendant Rutledge a Ruger rifle for cocaine.



- B. The position of the Government and probation office remains as stated in paragraph 35.

**Court's Findings**

1. X Court adopts probation officer's position.
2. X Court adopts Government's position.
3.    Court adopts defendant's position.
4.    Other: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**CERTIFIED BY**

/s/ Wade B. Maddox  
WADE B. MADDUX  
U.S. Probation Officer

**Reviewed and Approved:**

/s/ Roger C. Ahrens  
ROGER C. AHRENS  
Deputy Chief U.S. Probation Officer  
Date: 12/23/92

The Court adopts the above-listed findings on December 23, 1992.

/s/ Michael M. Mihm  
HONORABLE MICHAEL M. MIHM  
Chief U.S. District Judge

**In the  
United States Court of Appeals  
for the Seventh Circuit**

Nos. 93-1122, 93-2652, & 93-2653

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*v.*

TOMMY L. RUTLEDGE, SHELLY HENSON,  
and RICHARD HAGEMASTER

*Defendants-Appellants.*

Appeal from the United States District Court  
for the Central District of Illinois.  
No. 91 CR 40009 – Michael M. Mihm, *Chief Judge.*

ARGUED SEPTEMBER 9, 1994 – DECIDED NOVEMBER 10, 1994

Before BAUER, and FLAUM, *Circuit Judges*, and FOREMAN,\* *District Judge.*

BAUER, *Circuit Judge.* A jury convicted Tommy Lee Rutledge, Shelly Henson, Richard Hagemaster, and Stan Winters of conspiring to distribute cocaine in violation of 21 U.S.C. § 848. Additionally, the jury convicted Rutledge

\* The Honorable James L. Foreman, of the United States District Court for the Southern District of Illinois, is sitting by designation.

of conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848, distribution of cocaine in violation of 21 U.S.C. § 841(a)(1), possession of a firearm by a felon in violation of 18 U.S.C. § 924(g), and using or carrying a firearm during the commission of a drug felony in violation of 18 U.S.C. § 924(c). Rutledge, Henson, and Hagemaster appealed citing a surfeit of defects in their collective prosecution. Because we find no merit to their arguments, we affirm.

#### I. Facts

In November 1986, after his release from prison, Rutledge began dealing cocaine, a formative step that would soon develop into an extensive drug distribution network. From his base in Chicago, Rutledge would travel every two weeks to Astoria, Illinois to deliver up to two ounces of cocaine to Roger Malott. Soon thereafter, Rutledge moved to Youngstown, Illinois and put Malott to work for him, delivering cocaine and collecting debts resulting from drug sales. Rutledge's initial source of cocaine was Juan Gonzalez of Burlington, Iowa, an acquaintance of Rutledge's from prison and a member of the Latin Kings street gang based in Chicago.

Over the next several months, Rutledge, convinced several people to join his enterprise, including Shelly Henson, Richard Hagemaster, Rick Bolen, Randy Mustread, Kim Mummert, Tom Crowe, and Stan Winters. At one point, to demonstrate to Bolen that he was a major drug dealer and to convince him to join his outfit, Rutledge showed Bolen fifty pounds of marijuana and

one-eighth of a pound of cocaine stored in the trunk of his car.

Rutledge's methods of doing business were in many ways similar to those of his peers in the drug business. Firearms figured prominently in Rutledge's enterprise. Not only did he maintain a cache of weaponry to protect himself, his employees, and his inventory of drugs, Rutledge also trafficked in firearms. He was more than happy to trade firearms for cocaine and receive firearms in payment for cocaine shipments.

As if the constant presence of firearms was not enough, Rutledge used his connections with the Latin Kings (presumably forged during one of his stints in prison) to maintain control over his operation. He frequently invoked the name of the Latin Kings to intimidate employees and customers alike. Rutledge, however, reserved his most ominous invocation of the Latin Kings for his employees to ensure that no employee would implicate him in this drug enterprise. We will expand on Rutledge's use of this tactic shortly.

At some point during the course of his cocaine conspiracy, Rutledge changed the source of his cocaine; he began to buy cocaine from Roberto Laurel, a member of the Latin Kings in Chicago. Consistent with his *modus operandi*, Rutledge also traded arms with Laurel. To execute his transactions with Laurel, Rutledge would travel with, or send to Chicago in varying combinations, Malott, Mustread, Henson, and Mummert.

From November 1988 through July 1989, Rutledge's base of operations was a trailer he shared with Mummert,



Henson, and Hagemaster in Youngstown. Rutledge supported these three and provided them with cocaine. At this time, Rutledge employed Malott and Crowe in addition to his roommates. Henson, however, moved out of the trailer in July 1989 and terminated her association with Rutledge.

Henson's departure was likely hastened when Rutledge was arrested in the trailer in July 1989 by the Illinois State Police on the basis of statements made by Malott that Rutledge was involved with drugs and guns. The arresting officers discovered Rutledge's cache of weapons, but apparently found no drugs. When he learned of Malott's statement to the police, Rutledge threatened Malott with serious harm if Malott testified against him in court. Rutledge made similar threats to Mummert. Rutledge's intimidation succeeded; both Malott and Mummert testified before a state grand jury that Rutledge was not involved with drugs or guns. Rutledge was subsequently released.

Rutledge continued his drug operation until he was arrested by federal authorities in December 1990. Rutledge, Henson, Hagemaster, and Winters were indicted in February 1991. Malott, Mummert, Mustread, and a frequent customer of Rutledge's, Michael Wright, cooperated with the government and testified as to their experiences with Rutledge and his drug ring.

## II. Analysis

### A. Tommy Lee Rutledge

Rutledge's first argument is that he was denied a fair trial because two or three jurors encountered Rutledge in handcuffs outside the courtroom during the course of the trial. He contends that the trial court should have *voir dire'd* those jurors to determine whether Rutledge was prejudiced by this incident. As we shall explain, Rutledge received a trial as fair as possible given his own conduct, and the trial court handled the situation perfectly.

On the first afternoon of the trial, Rutledge made a statement to the Deputy United States Marshals to the effect of "what if I take off now?"<sup>1</sup> While the deputies believed that Rutledge was not serious in his threat, they discussed the situation and decided that Rutledge must be handcuffed going to and from the courtroom. On the morning of the second day of the trial, the prosecutor brought this incident to the attention of the trial judge, who approved handcuffing Rutledge.

To ensure that no jurors saw Rutledge being taken out of the courtroom in handcuffs, the deputies adopted certain procedures for bringing Rutledge in and out of the courtroom. Prior to taking Rutledge out of the courtroom, one deputy would check the outer hallway to ascertain whether any jurors were present. If the hallway was clear, the deputies would then lead Rutledge out of

<sup>1</sup> Deputy Kevin Jackson reported that he did not recall exactly what Rutledge had said but that it was a statement similar to "what if I take off now?" or "what if I flee?"



the courtroom into that outer hallway. Unfortunately, these measures were not foolproof.

At one point during the trial, two or three jurors briefly saw Rutledge in handcuffs. The deputies followed the procedures they had adopted for Rutledge, but the jurors entered the hallway just after it was checked. It is unclear whether at first glance the jurors necessarily knew that Rutledge was handcuffed; just to make sure that none of the jurors missed it, Rutledge raised his handcuffed hands in an exaggerated manner to show the jurors his handcuffs. Rutledge was immediately led away so that no additional jurors were treated to a similar demonstration.

The parties immediately brought this incident to the attention of the trial judge. The trial judge then offered to give the jury a cautioning instruction regarding the incident. He continued:

What I would suggest is that I simply make a statement to the jury that it has come to my attention that some of the jurors may have become aware of the fact that he is in custody and that's a reality in this case and I will caution them that the fact that he is in custody should not in any way be considered by them as any evidence or suggestion of guilt. Is that how you want to handle it or would you suggest something else?

After conferring with his client, Rutledge's counsel stated: "We would like to just skip it, your Honor."

Rutledge claims that such a sighting by jurors of a defendant in handcuffs is inherently prejudicial. Therefore, he argues that a curative instruction from the trial

judge is obviously insufficient and that, in this case, the trial judge, *sua sponte*, should have *voir dire'd* the jurors in question. Rutledge did not request such a *voir dire* from the judge at the time it happened. We believe this omission combined with Rutledge's failure to present any evidence from which we might find that he suffered actual prejudice resulting from this incident demonstrates that this argument lacks merit.

While we believe that this may be the first time that we have been squarely presented with this issue, we recently noted that "[c]ourts have generally found inadvertent sightings of shackles by the jury to be insufficient to demonstrate prejudice." *Woods v. Thieret*, 5 F.3d 244, 248 n.5 (7th Cir. 1993) (citing *Harrell v. Israel*, 672 F.2d 632, 637 (7th Cir. 1982) (citations omitted)). We therefore categorically reject Rutledge's argument that prejudice automatically inheres in a trial when a juror inadvertently sees a defendant in handcuffs. Our position is in accord with other circuits that have addressed this issue. See e.g., *United States v. Ware*, 897 F.2d 1538, 1542 (10th Cir.), *cert. denied*, 496 U.S. 930 (1990); *United States v. Garcia-Rosa*, 876 F.2d 209, 236 (1st Cir. 1989); *United States v. Halliburton*, 870 F.2d 557, 561 (9th Cir.), *cert. denied*, 492 U.S. 910 (1989). In situations such as this one, we hold that the defendant bears the burden of proving that he has suffered actual prejudice. See, e.g., *Garcia-Rosa*, 876 F.2d at 236. Here, neither Rutledge nor the record indicate that Rutledge has suffered actual prejudice.

The trial judge, in the best position to evaluate such things, stated on the record that he believed that Rutledge suffered no prejudice. In addition, the trial

judge not only offered a curative instruction, but specifically asked Rutledge's counsel what she wanted done. In a decision that was likely well-informed by her trial experience and reached after consultation with her client, Rutledge's counsel decided that dwelling on the incident was unwise. Her failure to request the *voir dire* at this time supports our belief that Rutledge's encounter with the jurors had no effect on his trial and that this encounter could only have prejudiced him if the jurors had been browbeaten about it.

The task of trying cases is one of dizzying pace and fraught with unexpected twists and turns. All parties to this trial (save Rutledge himself) surely sought to prevent the very incident that happened in this case, but it happened nevertheless. The trial judge acted swiftly and offered Rutledge the remedy of his choice. If Rutledge's counsel had been hell-bent on *voir dire*'ing the jurors, she had ample opportunity to request that of the trial judge. Rutledge and his counsel thought it best to put the incident behind them and move on; the trial judge agreed. We believe Rutledge suffered no prejudice, that the trial judge and Rutledge's counsel recognized that there was no prejudice and that the trial judge handled this incident properly.<sup>2</sup>

---

<sup>2</sup> Because Rutledge suffered no prejudice from the jurors' inadvertent sighting of him in handcuffs, we refrain from discussing Rutledge's role in creating whatever effect there may have been on his trial. Suffice it to say that defendants are well-advised to act as diligently as the court personnel in avoiding this type of incident.

Rutledge next complains of the admission of certain testimony by Malott linking Rutledge with the Latin Kings. He claims that this testimony was offered to inflame the jury, that its prejudicial effect greatly outweighed its probative value, and that it should have been excluded, apparently pursuant to Federal Rule of Evidence 403. We disagree.

Malott testified that after Rutledge was arrested in July 1989, he cooperated with agents from the Illinois State Police by giving them a statement concerning Rutledge's drug operation. Later, Malott discovered that Rutledge had obtained a copy of Malott's statement upon his release from prison. Rutledge then contacted Malott by telephone to inform Malott that Rutledge had a bullet with Malott's name on it. The two men met, and Rutledge showed Malott his copy of Malott's statement. Rutledge then waived a handgun at Malott and said:

We're going to have to get this straightened out. You know, I can have the Latin Kings down here in two hours to take care of this. I'm not going to jail for twenty years over your lying, making these kind of statements.

One week after Rutledge threatened Malott, Malott discovered a copy of his statement affixed to the side window of his truck; the letters "LK" were spray-painted in red on the statement. Two days later, three hispanic men, believed by Malott to be members of the Latin Kings, drove their car into the driveway of Malott's home. Malott scared them off by brandishing a shotgun.

Rutledge's threats were enough to cause Malott to perjure himself before the state grand jury by denying



that Rutledge operated a drug ring. At trial, the government offered Malott as one of its principal witnesses against Rutledge and the others. The government offered Malott's testimony describing Rutledge's threats, which necessarily invoked Rutledge's gang affiliation, to meet what it expected to be vigorous attempts to impeach Malott on the basis of his prior inconsistent statements before the state grand jury. Over objections, the trial judge allowed Malott to testify to Rutledge's threats. As expected, counsel for each defendant extensively cross-examined Malott about his previous perjury.

Rule 403 operates to exclude otherwise relevant evidence only if its probative value is substantially outweighed by its potential to create unfair prejudice to the defendant. In this instance, the trial court determined that Malott's testimony regarding Rutledge's threats should not be excluded. We review the trial court's decision to admit evidence for an abuse of that court's discretion. *See, e.g., United States v. Williams*, 31 F.3d 522, 527 (7th Cir. 1994). It is clear to us that the district court did not abuse its discretion in admitting this aspect of Malott's testimony.

Naturally, the vast majority of the government's evidence against a defendant is prejudicial to him. That's the idea. But in order to find that a particular piece of evidence must be excluded pursuant to Rule 403, its probative value must be insignificant compared to its inflammatory nature so that the evidence unfairly prejudices the defendant. That is not the case here. The government had a right to rehabilitate Malott as a witness by explaining his prior perjury; to do so, Malott was required to recount the reasons that he had perjured

himself. Rutledge does not deny that Malott's testimony is true, he simply claims that his testimony is too prejudicial.

Rutledge seems to argue that simply connecting a defendant with a gang constitutes unfair prejudice that substantially outweighs any probative value. We have approved, however, the admissibility of evidence of gang affiliation in a number of cases for a number of purposes. *See, e.g., United States v. Rodriguez*, 925 F.2d 1049, 1053 (7th Cir. 1991); *United States v. Lewis*, 910 F.2d 1367, 1372 (7th Cir. 1990) (collecting cases). More specifically, we have permitted its admissibility to explain a witness's prior inconsistent statement made out of fear of gang retaliation. *United States ex rel. Garcia v. Lane*, 698 F.2d 900, 902 (7th Cir. 1983). Malott's testimony regarding Rutledge's threats was highly probative evidence explaining Malott's prior inconsistent statement, and the trial court did not abuse its discretion in admitting it.

Rutledge's third argument is that because Rick Bolen did not testify at trial or at the sentencing hearing all statements attributed to him in the presentence report should have been omitted. He claims that because he was unable to cross-examine Bolen, Bolen's statements do not have the requisite indicia of reliability. Rutledge misperceives the reliability requirement.

At the sentencing hearing, Rutledge objected to the district court's consideration of Bolen's statements in the presentence report. Bolen's statements told of the incident in which Rutledge showed Bolen the marijuana and cocaine in the trunk of Rutledge's car and of other occasions on which Bolen accompanied Rutledge to Iowa to



deliver or obtain cocaine. To establish Bolen's reliability, the government called the case agent, Bruce Harmening. Harmening testified that he had compared the statements in the presentence report given by Bolen with the statements and trial testimony of other witnesses and with the physical evidence and found no significant inconsistencies. He testified that there were some minor inconsistencies, such as a variance of a few days with respect to dates of excursions to obtain drugs and slight differences in estimations as to the amount of cocaine Rutledge sold weekly. The district court found Harmening's testimony sufficient to support the probation officer's position in the presentence report.

The court then informed Rutledge that in order to challenge Bolen's statements, he must present evidence in addition to a simply denial demonstrating that Bolen's statements were not true. Rutledge discussed with his counsel whether to present any such evidence during a brief recess. They then informed the court that they would not present any evidence.

The district court conducted this aspect of Rutledge's sentencing hearing precisely in accordance with the controlling case in this circuit, *United States v. Coonce*, 961 F.2d 1268 (7th Cir. 1992). In *Coonce*, we articulated the proper procedure for contesting facts upon which a district court relies to sentence a defendant. We stated:

First, the defendant must challenge the facts in the presentence report . . . as being unreliable or incorrect. Having done so, and assuming the facts as presented bear sufficient indicia of reliability, the defendant must carry the burden of presenting some evidence beyond a mere

denial calling the reliability or correctness of the alleged facts into question. If the defendant meets this burden of production, the burden of persuasion then shifts back to the prosecution, who in turn must convince the court that the facts presented by the government are actually true.

*Id.* at 1280. Rutledge contends that the facts he has called into question, Bolen's statements, do not bear an indicia of reliability sufficient to trigger his burden of production under *Coonce*. He claims that Bolen's statements are simply naked assertions; as a result, he asserts that *Coonce* permits a mere denial to render them inapplicable in sentencing.

As an initial matter, Bolen's statements are not simply naked assertions. Plenty of other witnesses intimately involved in Rutledge's operation testified about his drugs and guns; that Bolen's statements are consistent with these other accounts indicates that they are based in fact. See *United States v. Westbrook*, 986 F.2d 180 (7th Cir. 1993). In addition, this consistency coupled with Harmening's testimony adequately support the district court's finding that Bolen's statements bear a sufficient indicia of reliability. Rutledge's challenge to these statements, therefore, fails.

Rutledge's fourth and final argument is that his Fifth Amendment rights have been violated because he was convicted and sentenced for operating a continuing criminal enterprise and for conspiracy to distribute cocaine. The Double Jeopardy Clause of the Fifth Amendment protects defendants from being tried and punished for the same offense twice. While the conspiracy charge is a

lesser included offense of the CCE charge, double jeopardy is not implicated as long as district court does not impose cumulative sentences for the crimes. *United States v. Bond*, 847 F.2d 1233, 1238 (7th Cir. 1988); see also *United States v. Jeffers*, 432 U.S. 137, 157-58 (1977). This is because:

[O]ne can both conspire (agree to run a drug business) and run a continuing criminal enterprise (strike the agreement and succeed). . . . The statutes reach the same group of persons. It is not illogical to convict a person of both agreeing to do something (§ 846) and succeeding on a grand scale (§ 848).

*Bond*, 847 F.2d at 1238. Concurrent sentences may be imposed for conspiracy and CCE provided the cumulative punishment does not exceed the maximum under the CCE act. *United States v. Bafia*, 949 F.2d 1465, 1473 (7th Cir. 1991); *Bond*, 847 F.2d at 1239.

In this case, the district court sentenced Rutledge to life imprisonment on his CCE conviction and life imprisonment on the conspiracy conviction to run concurrently with the CCE sentence. The maximum penalty under the CCE act at the time of Rutledge's sentencing was life imprisonment. Thus, by imposing concurrent sentences, the district court did not impose a cumulative penalty, and Rutledge's sentence is proper.

#### B. Shelly Henson

Henson's first argument is that the government's evidence against her is insufficient to support her conviction. In her brief, she went so far as to say: "Clearly, there

was no specific evidence as to Shelly Henson's role in regard to said conspiracy." We disagree; the government presented evidence that overwhelmingly supports Henson's conviction.

In reviewing Henson's claim, we must review the evidence in a light most favorable to the government, drawing all reasonable inferences. Then, we must ascertain whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

The government's evidence featured testimony from several witnesses intimately involved in Rutledge's drug conspiracy. Kim Mummert testified that Henson obtained cocaine for Rutledge, sold drugs that she received from Rutledge while living with him in the trailer, and helped pay the bills with money she earned selling Rutledge's drugs. Randy Mustread testified that Henson sold cocaine for Rutledge, delivered cocaine for him, and collected payment. Roger Malott testified that Henson cut cocaine for Rutledge, delivered cocaine for him, and collected payment. Malott also testified that Henson kept Rutledge's accounts regarding drug transactions. Michael Wright testified that Henson arranged cocaine sales for Rutledge and collected payments. The government's evidence easily supports Henson's conviction.

Henson next argues that the district court abused its discretion by admitting evidence of a pistol she had in her possession. Although the district court provided the jury with several instructions regarding the limited purposes for which they could consider this evidence, Henson maintains that the jury was unable to follow these



instructions. The district court properly admitted this evidence.

The gun was obtained by authorities from Henson when she and Wright were arrested in early 1989 in possession of one ounce of cocaine. The .25 caliber semi-automatic handgun and ammunition were found in Henson's purse. The police also found in Henson's purse Western Union money transfers which represented payment for drugs that Rutledge purchased from Randy Mustread.

The gun was introduced by Illinois State Police Special Agent Bruce Kettlekamp, who testified that he had discovered the gun in Henson's purse during the course of her arrest. Henson's counsel objected to the gun's relevancy, and district court overruled the objection and admitted the testimony for the limited purposes of showing a connection between Rutledge and Henson and for supporting the weapons charges against Rutledge. An ATF agent then testified as to the chain of custody of the gun, at which time the district court again reminded the jury of the limited purposes of the testimony regarding the gun. In addition, Wright, Mustread, and Malott all testified that Henson carried the gun, which was given to her by Rutledge ostensibly for her protection. During the testimony of each of these witnesses, the district court again admonished to consider the testimony for Henson's connection to Rutledge and with respect to Rutledge's gun charge.

It is clear that the district court addressed this situation perfectly. The government properly presented this evidence to demonstrate Henson's role in Rutledge's

drug enterprise and to connect Rutledge to the gun. Any potential for prejudice to Henson was snuffed out by the district court's repeated warnings to the jury. And, of course, we presume that jurors do what they are told. *See, e.g., United States v. Scott*, 19 F.3d 1238, 1244 (7th Cir. 1994) (citations omitted). The district court therefore properly admitted the evidence of the gun.

Henson next argument centers on a statement made by a prosecutor during closing argument. At that time, one of the prosecutors commented on the credibility of a defense witness. The prosecutor commented that this witness claimed that she saw Roger Malott near her home during the time in which Malott was in custody. The prosecutor then stated that "[t]he defense should have been embarrassed to hear her say that." Henson's counsel immediately objected, and the district court sustained the objection. The prosecutor went on to state that the witness' testimony was a physical impossibility, to which Henson's counsel did not object. Henson argues that the prosecutor's statement was so prejudicial to her that she requires a new trial.

We evaluate the prosecutor's comments to determine whether they were improper. *United States v. Neely*, 980 F.2d 1074, 1084-85 (7th Cir. 1993). If so, a new trial is warranted only if "the prosecutor's comments infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citation omitted). The prosecutor's comments in this case, while improper, do not remotely rise to the level of a due process violation. They were directed at a witness for another defendant and did not bear at all on the evidence presented against Henson.



Also, the judge quickly granted Henson's counsel's objection, and Henson's counsel had ample opportunity to counter the prosecutor's comments during the course of her argument. Finally, the evidence was so overwhelmingly against Henson on the conspiracy charge on which she was convicted that this minor transgression did not affect her guilty verdict at all.

Henson's last argument, also advanced by Richard Hagemaster, is that the district court erred in giving the government's multiple conspiracy instruction rather than one she preferred. Henson claimed that she was not involved in Rutledge's cocaine conspiracy, but in different conspiracies for which she was not prosecuted; she preferred a detailed instruction that she believed was necessary to present her defense. Notwithstanding the overwhelming evidence of her participation in Rutledge's cocaine operation, the district court, who admitted doubt of its necessity, gave the government's multiple conspiracy instruction. Again, the district court made the proper decision.

In reviewing the fitness of jury instructions to which objections were properly raised in the proceedings below, "we must determine from looking at the charge as a whole, 'whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine those issues.'" *United States v. Boykins*, 9 F.3d 1278, 1285 (quoting *Trustees of Indiana Univ. v. Aetna Casualty and Sur. Co.*, 920 F.2d 429, 437 (7th Cir. 1990)). A defendant is not entitled to have a particular instruction presented to the jury, but only to have her theory of the defense presented. *United States v. Boucher*, 796 F.2d 972, 976 (7th Cir. 1986). In these matters, the district court is

given substantial discretion with respect to the specific wording of the instruction. *United States v. Penson*, 896 F.2d 1087, 1090 (7th Cir. 1990).

The instruction tendered by the government and given by the district court informed the jury that if it should find that a particular defendant did not join the conspiracy that was charged in the indictment, it must find the defendant not guilty of conspiracy. This is the very instruction of which we approved in similar circumstances in *Penson*, 896 F.2d at 1091. Since we are not sure that a multiple conspiracy instruction is even warranted in this case, we agree with the district court that government's tendered instruction "is all any defendant could legitimately ask for in relation to this type of instruction." Henson and Hagemaster were not prejudiced by the district court's failure to give their preferred multiple conspiracy instruction.

#### C. Richard Hagemaster

Hagemaster's principal argument is that the district court erred in admitting Michael Wright's in-court identification of Hagemaster. He claims that Wright's identification is unreliable and therefore constitutes a denial of his Fifth Amendment Due Process rights. This argument is without merit.

During the course of the trial, Wright described a particular drug transaction that transpired in 1988 in which he gave money to Henson to deliver to Rutledge in exchange for an ounce of cocaine. Wright testified that he had waited several hours and after calling Rutledge twice

to remind him of his order, Rutledge assured Wright that the courier was on his way. Wright continued:

Forty-five minutes to an hour later, a car pulled up in the driveway, an old VW bug with no fenders on the rear end, and a tall, skinny guy got out wearing a fatigue jacket, pearl earring in his ear. Like I say, a very slender person. Crowe let him in. He introduced me to – I believe his name was – his name was Rick at the time. And we sat there and talked and, anyway, this guy, this Rick or the guy that had brought the dope, he threw it out on the coffee table and he said, "This is what it is."

Wright testified that he was displeased with the quality of the cocaine and that Hagemaster must have realized Wright's displeasure by the expression on his face because Hagemaster informed Wright that if the cocaine was unacceptable, Rutledge would return Wright's money. Wright then identified Hagemaster, in court and seated at the defense table, as the cocaine courier.

On cross-examination, Hagemaster's counsel pressed Wright for more details of the transaction. Wright happily obliged. Wright described Hagemaster's clothing again and testified that Hagemaster sat for thirty minutes in his living room where there were three or four lamps providing light. Wright also testified that he had seen Hagemaster on another occasion at Rutledge's trailer when Wright was there to obtain cocaine.

Wright also testified that he had originally described Hagemaster to investigating agents in 1990. Also, in a subsequent meeting with them, the agents showed Wright a single photograph and asked him whether he

recognized the person in the photograph. The person in the photograph was Richard Hagemaster, although the agents did not so identify him to Wright. It is the presentation of the single photograph of Hagemaster to Wright that Hagemaster claims was so suggestive as to render Wright's in-court identification of Hagemaster unreliable.

The admissibility of a challenged in-court identification is governed by a two-part test. First, we must determine whether the initial out-of-court identification was unduly suggestive; here, the presentation of the single photograph of Hagemaster. If so, the in-court identification is inadmissible unless it is so reliable, in view of the totality of the circumstances, as to prevent a substantial likelihood of misidentification. *Manson v. Brathwaite*, 432 U.S. 98, 107-14 (1977). The district court determined that the presentation of the single photograph of Hagemaster to Wright was unduly suggestive, and we do not disagree. But we also agree with the district court that Wright's in-court identification of Hagemaster was sufficiently reliable that it withstands Hagemaster's due process challenge.

Our inquiry into the reliability of Wright's in-court identification of Hagemaster is guided by several factors: the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time of the crime and the confrontation. *United States v. Larkin*, 978 F.2d 964, 970 (7th Cir. 1992) (citing *Manson*,



432 U.S. at 114). In this case, the totality of the circumstances, within the framework of these factors, demonstrates that Wright's in-court identification was indeed reliable.

Wright testified that he spent thirty minutes with Hagemaster in his well-lighted living room at the time of the crime. This provided Wright with ample opportunity to view Hagemaster. Wright's testimony indicates that he was quite attentive during the commission of the crime. He described Hagemaster's VW bus and his appearance in significant detail. In addition, Wright's belief that Hagemaster could see the displeasure register on Wright's face indicates that the two men were in reasonably close proximity with one another, each capable of noticing the other's features and expressions. And while the lapse of time between the time of the commission of the crime and the trial is not insignificant, Wright's detailed description of Hagemaster and his conviction that the man at the defense table was Hagemaster demonstrate that the identification was reliable. The district court properly admitted Wright's in-court identification of Hagemaster. Hagemaster's other claims are without merit and do not require discussion.

### III. Conclusion

For the foregoing reasons, the convictions of Tommy Lee Rutledge, Shelly Henson, and Richard Hagemaster are

AFFIRMED.

A true Copy:  
Teste:

---

Clerk of the United States Court of  
Appeals for the Seventh Circuit

---



## UNITED STATES COURT OF APPEALS

For the Seventh Circuit  
Chicago, Illinois 60604

January 3, 1995.

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. JAMES L. FOREMAN, District Judge\*

UNITED STATES	)	Appeal from the United
OF AMERICA,	)	States District Court for the
Plaintiff-Appellee,	)	Central District of Illinois,
No. 93-1122	)	91 CR 40009
v.	)	
TOMMY L. RUTLEDGE	)	Michael M. Mihm, Chief
Defendant-Appellant.	)	Judge.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-captioned case by defendant-appellant, a majority of the judges on the original panel have voted to deny and none of the judges in active service has requested a vote thereon.

Therefore, the petition for rehearing with suggestion for rehearing en banc is DENIED.

---

\* The Honorable James L. Foreman, United States District Judge for the Southern District of Illinois, is sitting by designation.

---

## SUPREME COURT OF THE UNITED STATES

No. 94-8769

Tommy L. Rutledge,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 26, 1995

---